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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,
Plaintiff,

vs. CASE NO. 05-CV-00329-GKF SAJ

TYSON FOODS, INC., et al.,
Defendants.

DEPOSITION OF DEREK SMITHEE
TAKEN ON BEHALF OF THE DEFENDANTS
ON APRIL 16, 2009, BEGINNING AT 9:00 A.M.
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES:

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Exhibit 22

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1 Oklahoma Conservation Commission.

2 A. Okay.

3 Q. So that's where I'm going, but perhaps the
4 specific programs will be an easier way to address it.

5 A. Okay.

6 Q. Let's first go to Exhibit No. 2. Can you
7 give me a general description of what these
8 spreadsheets are that are marked OWRB Response
9 Costs 0001, and I believe those go through 31, and
10 then there are some summary pages after that?

11 A. Am I free to reorder these for clarity?

12 Q. Absolutely.

13 A. Okay, what Exhibit 2 is. Every -- the
14 Beneficial Use Monitoring Program is a wholly state
15 supported monitoring program evaluating the state's
16 waters of which obviously the Illinois River Watershed
17 is a significant and important part.

18 What you have in Exhibit 2 is the analyses
19 that were conducted in the Illinois River Watershed,
20 Illinois River Walk, Baron Fork, Eldon, on and on and
21 on and the laboratory costs associated with that work.

22 Those are then captured in item 6 of the
23 summary and BUMP since its inception in 1998, of
24 \$290,000, that include -- that \$290,000 is laboratory
25 costs and personnel costs for the BUMP program to be

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1 executed in the Illinois River Watershed.

2 Q. All right. If we look at pages 1 through
3 32, do all of these pages relate to the BUMP program?

4 A. I don't even see a 32. Okay, it is the
5 summaries that I reordered for myself.

6 Q. Yes, this is my 32?

7 A. That's correct.

8 Q. And page 32 is a summary of pages 1 through
9 31; is that correct?

10 A. That is correct.

11 Q. Are pages 1 through 31 a summary of all the
12 sampling that you could document associated with the
13 BUMP program?

14 A. Yes.

15 Q. It is really --

16 A. I will say yes.

17 Q. Are you hesitating or --

18 A. I'm hesitating because some of these numbers
19 don't look right to me. They don't look right to me.

20 Q. I'm a little confused about the numbers,
21 too. Maybe we can figure this out together.

22 A. Okay.

23 Q. These numbers are hard to read, I
24 understand, but on page 31, it looks like these
25 columns at the bottom are essentially the same as what

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1 Q. So the nutrient sampling was to get, if I
2 understand the purpose, to get really better data that
3 reflected some high flow storm events also?

4 A. To reflect when the .037 phosphorous
5 criterion was promulgated, we promulgated a rule to
6 allow us to evaluate compliance with that criterion.

7 And so sometimes we had to take additional
8 samples to get a technically valid analysis.

9 Q. If we refer back to Exhibit No. 2 and go to
10 pages 33 and 34, which are the summary of costs?

11 A. Uh-huh.

12 Q. And number one on page 33 is the .037
13 criteria on development. Are there any costs
14 associated with this line item on 33 with evaluating
15 compliance with the .037?

16 A. Yes.

17 Q. Okay.

18 A. But not BUMP. Not sampling.

19 Q. Okay. Explain.

20 A. Okay. When we promulgated the .037
21 phosphorous criterion, we needed to know one of the
22 fundamental questions, of course, we talked about the
23 303(d) impaired waters list is how are we going to
24 determine if that is being met or not.

25 So we promulgated a rule to do that. That

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1 promulgation process took a lot of time and energy and
2 guts. So that Phil Morschel, PM \$22,000, is for
3 criterion development and the \$33,000 below that USAP
4 is for the development of the Use Support Assessment
5 Protocol.

6 So that \$55,000 is what we spent as a unit
7 in the promulgation of the criterion, promulgation of
8 the Use for Assessment Protocol and evaluating the
9 ambient data to see if it did or did not achieve that
10 number.

11 But it does not include the actual
12 collection of that sample or the laboratory analysis.

13 Q. And the collection of that sample and
14 laboratory analysis, is that included then in our
15 Exhibit No. 2?

16 A. Perfect.

17 Q. Tell me then about the man hours that were
18 spent collecting these samples and documented in
19 Exhibit No. 6 and 2, the personnel time, is that also
20 included in number 1 or 2 here?

21 A. No.

22 Q. So the time spent on number 1 here and 2 by
23 these individuals does not include any time for
24 sampling that's reflected in Exhibit No. 2?

25 A. That's correct.

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1 A. We are not claiming any.

2 Q. So on to the next item on page 33, and USAP
3 stands for Use Support Assessment Protocol; is that
4 correct?

5 A. That is correct.

6 Q. And please tell us for the record what this
7 refers to?

8 A. That is the dollar amount, \$1,000 for Derek,
9 \$33,000 for Phil to develop and finally promulgate
10 rules in chapter 46 to allow us to interpret Ambient
11 Water Quality Data for use support.

12 Q. And did you arrive at these numbers in the
13 same manner that you went back and determined the
14 numbers for the .037 criterion development?

15 A. Same process.

16 Q. And we have \$1,000 for your time and \$33,000
17 for Phil's time; is that correct?

18 A. That is correct.

19 Q. And is that the total amount of the claim
20 that you're making for work related to Use Support
21 Assessment Protocol?

22 A. It is.

23 Q. Okay. And there are no other hard costs or
24 sampling costs involved in -- that you are claiming?

25 A. That is correct.

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1 A. Which is -- that's correct.

2 Q. Okay. And if we went through any of the
3 other examples of parameters listed here on page 4,
4 could you tell me why a specific value was selected
5 from the various schedules contained in Exhibit 3?

6 A. I cannot, but I can find that for you.
7 11-29, I can find that for zinc, it is there.

8 Q. Well, my question goes to when there are
9 different costs for the same year, why the person
10 selected, for instance, arsenic at \$28 rather than
11 arsenic at \$23. Can you tell me why?

12 A. I cannot.

13 Q. And if we did the same example for copper
14 and found two different values, could you tell me why
15 the person selected one over another for copper?

16 A. I could not. But I could visit with that
17 person and find that information -- I'm sure there was
18 a rationale for that.

19 Q. You don't know who that person is?

20 A. I do not.

21 Q. And the same would be for any of the
22 parameters contained on Exhibit No. 4?

23 A. Any of the four.

24 Q. I'm having a hard time reading the last page
25 of Exhibit No. 4, so let's make sure we are clear --

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1 A. It is a little dark, isn't it?

2 Q. -- on the record.

3 A. \$14,469.28.

4 Q. Thank you, that is the total amount of
5 ODEQ's claim as it relates to the Ambient Trend
6 Monitoring Program; is that your testimony here today?

7 A. That is correct.

8 Q. And are there any other costs that the ODEQ
9 is claiming as response costs in this litigation?

10 A. Not that I am aware of.

11 Q. And you have not been designated to testify
12 about any other costs incurred by ODEQ?

13 A. That's correct.

14 Q. Let's take a look then at Exhibit No. 5.
15 Have you ever seen Exhibit No. 5 before today?

16 A. Yes.

17 Q. When did you see this declaration of Judith
18 Duncan before today?

19 A. A couple weeks ago.

20 Q. And did you receive this affidavit or
21 declaration at the same time that you received this
22 chart that we have at Exhibit No. 4?

23 A. Yes.

24 Q. And was the purpose of receiving the chart
25 and this declaration to prepare for your testimony